No. 95-856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM J. JANKLOW, GOVERNOR, AND MARK W. BARNETT, ATTORNEY GENERAL, IN THEIR OFFICIAL CAPACITIES,

Petitioners,

—v.—

PLANNED PARENTHOOD, SIOUX FALLS CLINIC, BUCK J. WILLIAMS, M.D. AND WOMEN'S MEDICAL SERVICES, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondents concur in Petitioners' statement of the procedural history of the case, but disagree with their description of the ruling of the court of appeals.

The court of appeals first determined what standard of review applies to facial challenges to abortion laws. It followed this Court's holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992) that "[i]f the law will operate as a substantial obstacle to a woman's choice to undergo an abortion 'in a large fraction of the cases in which it is relevant,...[i]t is an undue burden, and therefore invalid.'" Appendix to Petition for Writ of Certiorari (App.) 12 (citing 112 S. Ct. at 2830). The court of appeals rejected Petitioners' assertion that restrictions on abortion are valid on their face if they have any conceivable constitutional application. App. 9-12 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

The court of appeals then applied the undue burden analysis set out in *Casey*. It found that a requirement of parental notification -- whether to one or two parents -- places a substantial obstacle in the path of minors seeking abortions because it gives parents an opportunity to obstruct their daughter's choice. App. 16-18. Moreover, it held that the burden is not justified for mature minors or for minors whose best interests would be served by an abortion without parental involvement. It concluded that a statute that fails to provide a bypass procedure enabling such minors to avoid parental involvement is an undue burden and unconstitutional. App. 18.

The court of appeals then considered whether the statute provides an adequate "bypass" because it allows the physician to dispense with notifying a parent if the minor declares herself to be abused or neglected and the physician reports that abuse or neglect to state authorities. The court found the exception insufficient because it does not provide an opportunity for a minor to convince a neutral decisionmaker that she is entitled to a bypass if she is mature or if an abortion without parental notification would be in

her best interests. App. 21-24. The court of appeals cited record evidence indicating that there are many "best interests" minors who are neither abused nor neglected within the meaning of the statute. App. 24.

The court of appeals also found that the statute fails to provide an adequate alternative even for the abused and neglected minors it purports to reach. It found, based on record evidence, that minors are reluctant to report abuse and will turn to desperate measures, including suicide, if pushed to a choice between notifying an abusive parent and reporting that abuse. App. 25. It also found that the statute fails to protect the confidentiality of minors who report abuse because of numerous ways in which a minor's abortion may be revealed in the course of a juvenile court child abuse proceeding. The court concluded that "Planned Parenthood has shown that a large fraction of minors seeking pre-viability abortions would be unduly burdened by South Dakota's parental notice statute, despite its abuse exception." App. 25.

REASONS FOR DENYING THE WRIT

I. THE STANDARD FOR FACIAL CHALLENGES TO ABORTION STATUTES, INCLUDING THE TYPE OF STATUTE AT ISSUE IN THIS CASE, IS SETTLED.

For twenty-four years, this Court has consistently adjudicated facial challenges to abortion restrictions, and declared those restrictions unconstitutional, when they imposed an impermissible burden "in a large fraction of the cases in which [they were] relevant. . . ." *Planned Parenthood v. Casey*, 112 S. Ct. at 2830. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (striking law banning all abortions on its face because it was unconstitutional as to pre-viability abortions and abortions necessary for the health of the woman); *City of Akron v. Akron Center for Reproductive Health (Akron I)*, 462 U.S. 416 (1983) (striking hospitalization requirement as over-broad as applied to most second-trimester abortions). This Court never has required a showing that there are no circumstances in which the restriction could be constitutionally applied. *Cf. United States v. Salerno*,

481 U.S. at 745.[1]

This approach and the consistency of its application are particularly clear in cases such as the one at issue here, involving requirements of parental involvement in a minor's decision about abortion. This Court has invalidated such statutes on facial challenges despite explicit recognition that the statutes could be applied constitutionally to immature minors who would benefit from their operation. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976). *Bellotti v. Baird*, 443 U.S. 622, 648 (1979) *Akron I*, 462 U.S. at 439-40. *Hodgson v. Minnesota*, 497 U.S. 417, 461 (1990) (O'Connor, J. concurring). This Court never has required the challenging party to demonstrate that the statute could not be constitutionally applied to any minor.

The reasons for the rejection of the *Salerno* approach are obvious. Forcing each minor to mount a constitutional challenge to the law "as applied" to her would be a practical impossibility. The delays inherent in this approach would lead to evaporation of the very right the minor sought to assert. This Court therefore has ruled that state laws requiring the consent of or notice to a parent must contain a procedure (bypass) whereby the constitutional and unconstitutional applications of such laws are sorted out before the minor's opportunity to obtain an abortion is lost. *Bellotti v. Baird*, 443 U.S. 622 (striking a parental consent law that failed to make adequate exceptions for mature minors and those for whom an abortion would be in their best interests); *Akron I*, 462 U.S. at 440; *Planned Parenthood Association of Kansas City v. Ashcroft*, 462 U.S. 476, 491-94 (1983); *Hodgson*

[1] Although this Court has cited *Salerno* in some reproductive privacy cases, it was for the proposition that federal courts should not strike down a statute merely because it may have some unconstitutional applications, as for example a judicial bypass that could, in a worst case scenario, take a long time to complete. *Ohio v. Akron Center for Reproductive Health (Akron II)*, 497 U.S. 502, 514 (1990). This is a far cry, however, from upholding a statute merely because it has some constitutional applications.

v. Minnesota, 497 U.S. 417; *Casey*, 112 S. Ct. at 2832 (reaffirming that parental consent laws must contain a judicial bypass).

This Court's consistent rulings on abortion in general and minors in particular reject *Salerno*. That case never has been and should not be applied to reject facial challenges to laws requiring parental involvement in minors' abortions merely because such laws may have some constitutional applications. The federal courts are not confused about the appropriate standards and Petitioners fail to demonstrate a reason to grant certiorari on this issue.[2]

II. THE QUESTION OF WHETHER A JUDICIAL BYPASS IS REQUIRED FOR ONE-PARENT NOTICE STATUTES IS NOT A QUESTION OF NATIONAL IMPORTANCE, NOR IS THERE ANY CONFLICT IN THE LOWER FEDERAL COURTS ON THIS SUBJECT.

This Court consistently has required that parental notice or consent laws provide a minor an opportunity to convince an independent decisionmaker that she should be exempted from the

[2] The federal courts consistently have applied *Casey's* "large fraction" test. *A Woman's Choice East Side Women's Clinic v. Newman*, 1995 WL 678345 (S.D. Ind. Nov. 9, 1995); *Utah Women's Clinic v. Leavitt*, 844 F. Supp. 1482 (D. Utah 1994); *Planned Parenthood v. Miller*, (App.); *See also, Casey v. Planned Parenthood*, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (on remand) (dicta). Only the fifth circuit continues to cite *Salerno* as the applicable standard. *Barnes v. Moore*, 970 F.2d 12, 14 & n.2 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 656 (1992). At least one district court in that circuit, however, continues to recognize that, despite the literal language of *Salerno*, a viable bypass is necessary to sort out the constitutional and unconstitutional applications of parental involvement statutes. *Causeway Medical Suite v. Ieyoub*, 1995 WL 626201 (E.D. La. Oct. 24, 1995).

law's requirement if she is mature or if an abortion would be in her best interests. This Court unambiguously reaffirmed these holdings in *Casey*, upholding a parental consent law because it contained such an alternative. 112 S. Ct. at 2832. *See also Hodgson* 497 U.S. at 417-19 (striking a requirement of notification to two parents because of the lack of a bypass).[3]

Every lower court to consider the issue has held that this Court's decisions on parental involvement mandate that a bypass is a necessary adjunct to a parental notification law, whether it requires notice to one or both parents. *Planned Parenthood v. Miller*, App.; *Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985) (holding requirement of a bypass applies to both notice and consent laws), *aff'd by an equally divided court*, 484 U.S. 172 (1987); *Indiana Planned Parenthood Affiliates Association v. Pearson*, 716 F.2d 1127 (7th Cir. 1983) (striking one-parent notification law for lack of a sufficient judicial bypass); *Akron Center for Reproductive Health v. Slaby (Akron II)*, 854 F.2d 852, 860-61 (6th Cir. 1988), *rev'd on other grounds*, 497 U.S. 502 (1990); *Orr v. Knowles*, slip op. No. CV 81-0-301 (D. Ne. Feb. 20, 1991) (Court of Appeals Joint Appendix at 73), *appeal dismissed as moot sub nom. Epp. v. Kerrey*, 964 F.2d 754 (8th Cir. 1992) (refusing to vacate injunction against one-parent notification law that lacked an adequate judicial bypass); *Wicklund v. Salvagni*, No. 93-92-BU-JFB slip op. at 4-5 (D. Mt. Sept. 27, 1995) (striking as unconstitutional one-parent notification law that lacked a sufficient judicial bypass) (Appendix to this Brief); *Wicklund v. Salvagni*, No. 93-92-BU-JFB (D. Mt. Dec. 21, 1993) (striking as unconstitutional parental notification law that locked a judicial bypass) (Court of Appeals Joint Appendix at 516). *See also, Causeway Medical Suite v. Ieyoub*, 1195 WL 626201 (E.D. La. Oct. 24, 1995) (striking parental consent law because judge hearing bypass petition could notify a minor's parent).

[3] *Hodgson* makes clear that petitioners are incorrect in stating that this Court has never decided that a notice statute requires a bypass. Petition at 8 and 12.

Moreover, with the solitary exception of the State of South Dakota, every state that has enacted a one-parent notification law in the past fifteen years has included a judicial or other waiver option.[4] Petitioners' desire to make a test case out of this issue does not bootstrap it into one of national importance warranting this Court's review.

Equally unpersuasive is Petitioners' claim that this case is of national importance because it involves the "legal nature of the parent-child relationship" and the state's ability to enhance that relationship. Petition at 11. This Court has always been cognizant of parental interests in deciding the validity of parental involvement laws. *Bellotti*, 443 U.S. at 637-38; *Hodgson*, 497 U.S. at 446-47. Nonetheless, the Court has consistently struck down laws that fail to provide an alternative to parental involvement for mature or best-interest minors because the "justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interest of the child." *Hodgson*, 497 U.S. at 454, (citing *Bellotti*, 443 U.S. at 651).

In summary, Petitioners fail to justify their request that this Court grant certiorari to decide what weight should be afforded parents' interests in their daughters' abortion decisions. This issue was resolved long ago.

III. THE UNDUE BURDEN TEST IS THE SETTLED STANDARD OF REVIEW FOR ABORTION LEGISLATION.

In *Planned Parenthood v. Casey*, 112 S. Ct. 2791, this

[4] Ark. Code Ann. § 20-16-801 to 808 (1994); 24 Delaware Code 1781-1789 (1995); Ga. Code Ann. § 15-11-110 to 118 (1994); 1995 Ill. ALS 18 (1995); Kan. Stat. Ann. § 65-6705 (1993); Md. Health-Gen. Code Ann. § 20-103 (1994); Neb. Rev. Stat. § 71-6901 to 6909 (1994); Nev. Rev. Stat. Ann 442.255, 442.2555 (Michie 1993); Ohio Rev. Code Ann. 2929.12 (Baldwin 1994); W. Va. Code 16-2F-1 to 9 (1995).

Court announced that henceforth abortion laws would be judged by the "undue burden" standard. The *Casey* Court made clear that its decision was intended as definitive, clarifying and setting aside any prior inconsistent views on the "standard of review" question. *Id.* at 2820. Moreover, *Casey* specifically applied the "undue burden" standard to parental involvement laws. *Id.* at 2821, 2832.

Contrary to Petitioners' argument, the majority of the Court in *Hodgson v. Minnesota* did not state that the rational basis standard should be used to test the constitutionality of laws requiring parental notice of a minor's abortion decision. Petition at 11. Rather, the Court ruled that a Minnesota law that lacked a judicial bypass did not even pass the rational basis test, making it unnecessary for the Court to apply any higher standard of review. 497 U.S. at 450.

Petitioners have not identified a single court that has adopted the "rational relationship" test for abortion laws affecting minors or even considered doing so. There is no lack of clarity on this subject, no conflict between the decision of the court below and prior decisions of this Court, and therefore no reason to grant certiorari on this issue.

IV. THE COURT OF APPEALS' DECISION FAITHFULLY FOLLOWS THIS COURT'S UNDUE BURDEN ANALYSIS.

Petitioners argue that the court of appeals misapplied the undue burden standard to the facts of this case. However, "a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. Petitioners' claims amount to no more than that and, therefore, even if correct, do not merit review by this Court. Nevertheless, as shown below, the court of appeals correctly applied the undue burden analysis laid out in *Casey* and Petitioners' claims of error are incorrect.

According to *Casey* a court must analyze an abortion statute to determine whether, as a practical matter, it poses a

substantial obstacle to effectuation of the abortion decision for a large fraction of the women it affects. For example, in *Casey*, this Court struck down a husband notification requirement because, although it did not give husbands a legal veto power over their wives' abortions, as a practical matter it would deter a significant number of women from seeking abortions out of fear for their own safety as well as that of their children. 112 S. Ct. at 2829-30.

The court of appeals applied exactly this analysis, finding that the South Dakota one-parent notice statute, as a practical matter, gave parents an opportunity to obstruct their daughters' access to abortion. App. at 17. Moreover, it cited record evidence that a requirement of parental notification could work substantial harm in already disturbed families, lead to abuse of minors, deter some minors from seeking abortions, and even lead some to suicide. App. 23-25. It concluded that in a large fraction of cases minors would be unduly burdened by a one-parent notice requirement without a bypass. *Id.*

Petitioners' various claims as to error must fail in light of the foregoing.

▸ Petitioners are wrong in asserting that the finding of an undue burden, and the consequent need for a judicial bypass, is somehow dependent on whether a statute creates a legally binding "veto power" over a minor's abortion. Petition at 12-13. In *Hodgson*, this Court struck down a two-parent notification statute, which did not provide for such a veto, because it failed to provide for a judicial bypass. 497 U.S. at 450 and 459-60 (O'Connor, J., concurring). *See also Bellotti* (striking a parental consent law because it failed to allow a minor to seek a judicial bypass without notifying her parent).

▸ A finding of an undue burden also does not depend on whether a statute requires notice to one or both parents. Petition at 13-15. Applying *Casey's* functional test, the court of appeals found that both one- and two-parent notice laws create obstacles in the path of a minor by giving her parents an opportunity to

block her access to abortion services; both create the opportunity for retaliation, abuse, and disruption of the family. App. 14, 18 and 24. These obstacles amount to an undue burden, regardless of whether one or both parents are to be notified. App. 18. [5]

▸ Petitioners incorrectly fault the court of appeals for holding that mature minors have a right to avoid parental notification. Petition at 15-17. The court of appeals' ruling on this subject comports with every ruling of this Court and of numerous lower federal courts that mature minors are entitled completely to avoid parental involvement. *Bellotti v. Baird*, 443 U.S. at 643, *Akron II*, 497 U.S. at 522 (Stevens, J., concurring in part and concurring in the judgment), *Hodgson v. Minnesota*, 497 U.S. at 461 (O'Connor J., concurring). *See, e.g. Zbaraz v. Hartigan*, 763 F.2d at 1539; *Indiana Planned Parenthood Affiliates v. Pearson*, 716 F.2d at 1134; *Orr v. Knowles*, slip op. (Court of Appeals Joint Appendix at 73).

▸ Contrary to Petitioners' assertion, Petition at 17-18, the court of appeals was correct in holding that the South Dakota statute fails to provide a sound alternative for abused minors. In

[5] Moreover, the court of appeals made the specific finding that "roughly eighteen percent of minors live in single parent homes; many of them, as a practical matter have only one parent to notify." App. 24 n.10. The court cited these data to show the harms minors face under a one-parent notice statute when the custodial parent is abusive or nonsupportive and the minor has no other parent to whom she can turn. In criticizing the court of appeals' reliance on these data, Petitioners cite *Hodgson* for the proposition that evidence of harm to minors living in single-parent homes is relevant only when the statute at issue requires notice to two parents. Petition at 14. *Hodgson* does not support this proposition. Nothing in *Hodgson* forecloses a finding that a one-parent notice statute harms minors from single-parent homes. In fact, Justice O'Connor held in *Hodgson* that the judicial bypass was necessary to provide an option for the minor who could not notify either parent. 497 U.S. at 461 (O'Connor, J., concurring).

Casey this Court recognized that:

> Secrecy typically shrouds abusive families. Family members are instructed not to tell anyone, especially police or doctors, about the abuse and violence. Battering husbands often threaten their wives or her children with further abuse if she tells an outsider of the violence and tells her that nobody will believe her.

112 S. Ct. 2827. These conclusions as to the constitutional inadequacy of husband notice echoed the conclusions in *Hodgson* about the harms of a parental notification requirement without a judicial bypass. In *Hodgson v. Minnesota*, Justice O'Connor specifically ruled that the statute's exception for reported abuse was not a viable alternative, in part, because of the reluctance of minors to report abuse. 497 U.S. at 460 (O'Connor J., concurring, citing *Casey* at 440 n.26).

The South Dakota exception is no more viable because, as found by the court below, South Dakota minors will undertake drastic measures to avoid revealing abuse. App. 25. Petitioners' dispute with these factual findings does not warrant a grant of certiorari. Supreme Court Rule 10. [6]

[6] Petitioners argue that this Court's approval of a bypass for best-interests minors means the minor will have to reveal the abuse anyway in order to obtain a waiver. Petition at 18. So, according to the Petitioners, they are providing minors with a less oppressive option by letting them reveal abuse to the physician. This Court however, never has approved a bypass statute that requires a minor to reveal abuse in order to obtain a waiver of a parental consent or notice requirement. A minor unwilling to reveal abuse could demonstrate that she is mature or that an abortion without parental involvement is in her best interests for some other reason. In contrast, an abused minor in South Dakota seeking an abortion must choose between revealing the abuse and informing an abusive parent of her intention to have an abortion. This is the very choice this Court has disapproved. *Hodgson*, 497 U.S. at 439 and n.26.

▸ Contrary to Petitioners' argument, Petition at 19-20, the court of appeals correctly found that the "'bypass' for abused and neglected minors falls short in protecting the confidentiality of the minor's decision to have an abortion." App. 20. Although the South Dakota statute instructs agencies that investigate and prosecute child abuse cases not to reveal to parents that their daughter sought an abortion, the statute fails to extend this exhortation to juvenile courts that hear child abuse cases. The South Dakota discovery statutes governing abuse and neglect proceedings in juvenile court provide numerous opportunities for information about the minors' abortion to be revealed in the course of those proceedings. App. 21 and statutes cited therein.

Petitioners are mistaken in asserting that juvenile courts would have to disregard the discovery mandates of these statutes in favor of the later-enacted abortion law. The abortion law does not apply to juvenile court proceedings; thus, it does not supersede the discovery statutes. The court of appeals' judgment on this issue of state law is entitled to deference by this Court, *Frisby v. Schultz*, 487 U.S. 474, 482 (1988), and does not merit certiorari.

CONCLUSION

The standard to be applied to facial challenges to abortion laws is well settled. Petitioners raise no federal questions of national importance to resolve in this case and all aspects of the court of appeals' decision are fully consistent with the decisions of this Court. The petition for certiorari should be denied.

Respectfully submitted,

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December 28, 1995

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

SUSAN WICKLUND, M.D., et al.,	)	
	)	
Plaintiffs,	)	No. CV 93-92-BU-JFB
v.	)	
	)	MEMORANDUM AND
	)	ORDER
MICHAEL SALVAGNI, in his	)	
individual capacity and	)	
in his official capacity	)	
as Gallatin County Attorney	)	
	)	
Defendant.	)	

Pending before the Court are cross-motions for Summary Judgment by Plaintiffs and Defendant. To expedite the decision, and with the parties' concurrence, the matters raised are deemed submitted without the need for oral argument. After considering the briefs and supporting documents submitted, the Court rules as follows.

This action was originally filed on November 23, 1993. The Plaintiffs sought an order enjoining Defendant from enforcing from enforcing Mont. Code Ann. § 50-20-107(1)(b), which required parental notification before an abortion could be performed on a minor. This Court entered a Temporary Restraining Order on November 30, 1993 enjoining Defendant from enforcing Mont. Code Ann. § 50-20-107(1)(b). The temporary Restraining Order remained in effect until the Court entered a final judgment on December 21, 1993. The Judgment based on the parties' stipulation, permanently enjoined enforcement of Mont. Code Ann. § 50-20-107(1)(b) because it was unconstitutional. On July 17, 1995, this Court granted Plaintiffs'

Motion for Leave to File a Supplemental Complaint. Plaintiffs are currently contesting the constitutionality of HB 482, a new parental notification provision that was signed into law by Montana Governor Marc Racicot on April 15, 1995.[1] The law is scheduled to go into effect on October 1, 1995.

The Plaintiffs and Defendant agree that it is a matter of law to be decided by the Court as to whether HB 482 is constitutional. The law at issue requires parental notice for unemancipated minors and incompetent persons seeking abortions. HB 482, § 4.[2] An "emancipated minor" is defined as "a person under 18 years of age who is or has been married or who has been granted an order of limited emancipation by a court as provided in 41-3-406." HB 482 § 3(3). Section 9 provides for judicial waiver of the notice requirement and is at the heart of the motions presently pending. Section 9 provides that a minor "may petition the youth court for a waiver of the notice requirement and may participate in the proceedings on the person's own behalf." The petition may be granted by the youth court and the notice requirement waived pursuant to four different alternatives. These include:

(1) "If the court fails to rule within 48 hours and time is

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[1] The law is entitled "AN ACT REQUIRING PARENTAL NOTIFICATION PRIOR TO AN ABORTION FOR A MINOR OR INCOMPETENT PERSON; PROVIDING A JUDICIAL WAIVER OF NOTIFICATION; PROVIDING PENALTIES; AMENDING SECTION 41-1-405, MONT. CODE ANN.; AND REPEALING SECTION 50-20-107, MONT. CODE. ANN." A copy of the law is attached as an Appendix to this ruling.

[2] Section 4 provides: Notice of parent required. A physician may not perform an abortion upon a minor or an incompetent person unless the physician has given at least 48 hours actual notice to one parent or to the legal guardian of the pregnant minor or incompetent person of the physicians's intention to perform the abortion.

not extended." § 9(3).

(2) If the court finds that petitioner is "sufficiently mature to decide whether to have an abortion." § 9(4).

(3) If the court finds that "there is evidence of a pattern of physical, sexual, or emotional abuse of the petitioner by one or both parents, a guardian, or a custodian." § 9(5)(a).

(4) If the Court finds that "the notification of a parent or guardian is not in the best interests of the petitioner." § 9(5)(b).

Plaintiffs claim that Section 9 of HB 482 is unconstitutional for four reasons.[3] First, because a minor must petition the youth court for a waiver of notice, the Plaintiffs argue that Mont. Code. Ann. § 41-5-500(1), which requires service of a summons on a petitioner's parents after a petition is filed in youth court, effectively notifies the minor's parents of the judicial waiver procedure.[4] Second, Plaintiffs argue that the provision

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[3] The Plaintiffs assert in a footnote that HB 482 is also invalid because section 7, which provides that "public assistance benefits may not be used [by an emancipated minor] to obtain an abortion," violates Title XIX and the Hyde Amendment. See, Pls' Br. In Supp. of Pls. Mot. for Summ. J., p.6 n.3 (citing Planned Parenthood of Missoula Inc. v. Blouke, 858 F.Supp. 137 (D. Mont. 1994)). The Court will not address this issue because it was not properly raised and briefed. Plaintiff also initially challenged the lack of an expedited appeals procedure for the judicial bypass proceedings. However, in the interim the Montana Supreme Court has adopted such a procedure and Plaintiffs' challenge to the adequacy of the bypass provision on that basis is therefore moot.

[4] Mont. Code Ann. § 41-5-502. Summons. (1) After a petition has been filed, summons must be served directly to: (a) the youth; (b) his parent or parents having actual custody of the youth or his

allowing for waiver if notification of the parents would not be in the best interests of the petitioner, improperly narrows the consideration of what is in the minor's overall "best interests." Glick v. McKay, 937 F.2d 434, 438 (9th Cir. 1991). Third, Plaintiffs argue that if the minor seeks a waiver of notification based on abuse, constructive notice to the minor's parents will occur because the youth court will initiate an investigation of the home pursuant to Mont. Code Ann. § 41-3-202. Finally, Plaintiffs argue that the statute violates the Equal Protection Clause of the U.S. Constitution. Defendant has moved for summary judgment on the first, third and fourth claims. Plaintiffs have filed a cross-motion for summary judgment on the first, second and third grounds. Because the Court decides the motions in favor of Plaintiffs on the basis of the second ground, concerning the scope of the "best interests" inquiry, it will not address the remaining grounds for summary judgement asserted by either party.

A. Best Interests Inquiry

One ground for summary judgment raised by Plaintiffs concerns the scope of the "best interests" inquiry to be conducted by the youth court, in determining whether judicial bypass of the notice requirement is appropriate. The United States Supreme Court has stated that in judicial bypass proceedings in the context of a parental consent statute,

> A pregnant minor is entitled to show the court either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

Bellotti v. Baird, 443 U.S. 622, 640-642 (1979); see also Ohio v.

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guardian or custodian, as the case may be; and (c) other person as the court may direct.

Akron Center for Reproductive Health ("Akron Two"), 497 U.S. 502, 511 (1990). It is also well established that because of the greater intrusiveness of parental consent requirements, a notice-bypass provision that meets the requirements of a consent-bypass provision passes constitutional muster. Akron II, 497 U.S. at 511. Plaintiffs do not contend that the Montana parental notification statute does not meet the first requirement, and the Court specifically finds that it does. However, the "best interests" inquiry under Bellotti requires that in judicial bypass proceedings, a minor be given a chance to show that the abortion would be in her best interests. This is noticeably different than the inquiry under the Montana statute, which waives notification only if the Court first finds that notification would not be in the minor's best interests. The Eleventh Circuit Court of Appeals has noted the connection between these two standards, but did not believe that the difference was "constitutionally significant." See Planned Parenthood Ass'n of Atlanta v. Miller, 934 F.2d 1462, 1477 n.21 (11th Cir. 1991). However, the Ninth Circuit Court of Appeals, which controls this Court's decisionmaking, has a different view.

In Glick v. McKay, 937 F.2d 434 (9th Cir. 1991), the Ninth Circuit Court of Appeals applied the Bellotti standards for a parental consent judicial bypass statute to a notification statute, and found that it did not pass constitutional muster because the statute required an inquiry into whether notification, not abortion, was in the minor's best interests. Id. at 439. The Glick court quoted Bellotti, stating that

> "[i]f, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement." Bellotti, 443 U.S. at 648, 99 S. Ct. at 3050 (emphasis added). Therefore, the Nevada statute impermissibly narrows the Bellotti "best interests" criterion, and is unconstitutional.

Id. However, the Glick Court did not expressly hold that parental consent bypass standards apply in a notice context; instead, the

statute was found unconstitutional on other grounds and the Bellotti problem "only [added] to the infirmity." Id. at 442.

In the context of a parental consent statute, the Court would have no problem applying Glick to determine that a judicial bypass provision focusing the "best interests" inquiry upon the narrow issue of notification, rather than the broader issue of whether an abortion is in the minor's best interests, is unconstitutional. However, the present case involves a parental notification statute, not a parental consent statute. Neither the U.S. Supreme Court nor the Ninth Circuit Court of Appeals have expressly decided what, if any, are the requirements of a judicial bypass procedure in a parental notice, as opposed to a parental consent, statute. This Court looks to other circuits for guidance on the issue.

The Eighth Circuit Court of Appeals has addressed the same issue, and is the only one to have done so in a fairly thorough manner. See Planned Parenthood, Sioux Falls Clinic, v. Miller ___ F.3d ___, 1995 WL 513959 (8th Cir. (S.D. 1995)). In Miller, the court began by noting that "the Supreme Court has established that the State may require parental notice for immature minors who cannot show that an abortion would be in their best interests." Id., 1995 WL 513959 at *5 (citing H.L. v. Matheson, 450 U.S. 398, 409 (1981)). However, "the Supreme Court has yet to decide whether a mature or "best interests" minor is unduly burdened when a State requires her physician to notify one of her parents before performing the abortion." Id. To resolve that issue, the Eighth Circuit considered the reasons why "requiring parental notice--or, for that matter parental consent-- is not an undue burden upon immature minors who cannot show that an abortion would be in their best interests." Id. The answer, in the view of the Eighth Circuit, "is that they are minors, and States may impose requirements on immature minors that it may not impose on adults." Id. at *6 (citations omitted).

When dealing with a mature minor, the state's attempt to give parents power over the abortion decision is on a collision course with the Constitution. Id. (citing Bellotti, 443 U.S. at 643-

44 & n.23). "By showing that they are capable of mature, informed consideration, such minors establish that the State has no legitimate reason for imposing a restriction on their liberty interests that it could not impose on adult women." Id.

In the case of an immature minor whose best interests would be served by having an abortion, "the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child." Id. (quoting Hodgson v. Minnesota, 497 U.S. 417, 454 (1990)). "But if the minor can show that an abortion without notification would be in her best interest, then the State has no further reason for requiring such notice." Miller, 1995 WL at *5.

> For both mature and "best interest" minors, then, the State has no legitimate interest in imposing a parental notice requirement with the purpose or effect of placing a substantial obstacle in their paths when they seek pre-viability abortions. For this reason, we hold that the State may not impose a parental-notice requirement without also providing a confidential, expeditious mechanism by which mature and "best interest" minors can avoid it. In short, parental notice provisions, like parental-consent provisions, are unconstitutional without a "Bellotti-type bypass."

Id. (emphasis added).

This Court agrees with the thoughtful reasoning of the Eighth Circuit, and further believes that the Ninth Circuit, having held in Glick that a notice-bypass provision must meet constitutional scrutiny, see Glick, 937 F.2d at 442, would also apply the Bellotti standards to determine the scope of the "best interests" inquiry required. See also Zbaraz v. Hartigan, 763 F.2d 1532, 1539 (7th Cir. 1985), aff'd, 484 U.S. 171 (1988), (parental notice statute could only withstand constitutional scrutiny if it provided a bypass procedure consistent with Bellotti II) (citing Indiana Planned Parenthood Affiliates Ass'n. v. Pearson, 716 F.2d

1127 (7th Cir. 1983)). After all, the failure of the Nevada statute to meet the Bellotti standards was one of the two reasons given for holding the parental notice statute unconstitutional. Glick, 937 F.2d at 442. Under Bellotti, and Glick,[5] a minor must have an opportunity to show not just that notification is not in her best interests, but that having an abortion is in her best interests. The Montana judicial bypass statute does not conform with the Bellotti standards, impermissibly narrows the scope of the "best interests" inquiry, and places an undue burden upon the right of a minor who is able to show that abortion is in her best interests, to obtain an abortion without parental involvement. It is therefore unconstitutional.

B. Arnott's Renewed Motion to Intervene

Finally, there is a "Renewed Motion to Intervene as Defendant by Representative Arnott." This Motion was filed on September 14, 1995, three days after the Court denied Representative Arnott's original Motion to Intervene. Representative Arnott argues that she should have the opportunity to intervene because her interests are not adequately represented by the Attorney General. She bases this argument on the fact that the Attorney General has not filed a motion to sever Section 12 of HB 482, from the rest of the bill.[6] However, the Defendant has

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[5] Defendant argues that Glick is no longer good law, after Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992). However, nothing in Casey alters the Court's reasoning above. To the contrary, Casey reaffirms that the State may not unduly burden a minor's access to abortion. Casey, 112 S. Ct. at 2831. As noted above, the imposition of a notification requirement without an adequate Bellotti-type bypass provision, would constitute an undue burden upon the right of a mature or "best interests" minor to have an abortion.

[6] Section 12 provides: RIGHT OF INTERVENTION. PURSUANT TO RULE 24(A), MONTANA RULES OF CIVIL PROCEDURE, A LEGISLATOR HAS THE RIGHT TO INTERVENE IN ANY CASE IN WHICH THE LEGALITY OF TITLE 50, CHAPTER 20, IS CHALLENGED.

stated that section 12 is severable and that the motions at issue only address the constitutionality of sections 1-10 of HB 482. See Com. Rep. Br. in Supp. of Def's Mot. for Summ. J., p.16 n.5. The Court concludes that this is not a proper basis for Arnott to intervene and further concludes that any potential interests of Arnott are, as previously stated in the Memorandum and Order of September 11, 1995, adequately represented. Wherefore,

IT IS ORDERED that Plaintiffs' Motion for Summary Judgment is granted and Defendants' Motion for Summary Judgment is denied. Sections 1 through 10 of Montana HB 482 are hereby declared unconstitutional, and Defendant is permanently enjoined from enforcing those sections.

IT IS FURTHER ORDERED that the Representative Arnott's Renewed Motion to Intervene is denied.

The Clerk is directed to enter Judgment accordingly and notify counsel of record and Mr. Timothy J. Whalen of this Order.

DONE AND DATED this 27th day of September, 1995.

James F. Battin
Senior U.S. District Judge